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7 HARTFORD CASUALTY INSURANCE
COMPANY,
8 Plaintiff,
9 v.
10 FIREMAN'S FUND INSURANCE
COMPANY, et al.,
11 Defendants.

Case No. 15-cv-02592-SI

**ORDER GRANTING FIREMAN'S
FUND INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 74

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13 On July 8, 2016, the Court held a hearing on defendant Fireman's Fund Insurance
14 Company's motion for summary judgment. Dkt. No. 74. After careful consideration of papers
15 submitted, and for the reasons articulated in open court, the Court hereby GRANTS the motion.

16
17 **BACKGROUND**

18 **I. The Underlying Action and the Policies**

19 In 2013, a wrongful death lawsuit (the "Underlying Action") ultimately resulted in an
20 approximately \$8,800,000 judgment against Herndon Partners, LLC ("Herndon"),¹ a corporation

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23 ¹ The Court GRANTS Hartford's unopposed request for judicial notice of the certified
copy of the Limited Liability Company Articles of Organization for Herndon, Partners, LLC, filed
with the California Secretary of State on April 9, 2003. See Dkt. No. 83 (Hartford's RJN). The
Court observes that it granted Fireman's Fund's identical request eight months ago. See Dkt. No.
57 (Order on Fireman's RJN); Dkt. No. 45 (Fireman's RJN). Upon a properly supported request
by a party, a federal court may take judicial notice of adjudicative facts. Fed. R. Evid. 201(a), (d).
Facts subject to judicial notice are those which are either "(1) generally known within the
territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort
to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court may
not take judicial notice of a matter that is in dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 690
(9th Cir. 2001).

1 owned by Paul Owhadi.² The lawsuit arose after Francisco Martinez Moreno was electrocuted
2 while working as an employee of Herndon at a home located at 31522 Broad Beach Road in
3 Malibu, California (the “Malibu Property”) in September 2009.³ Kastan Decl., Ex. N, May 29,
4 2013 letter from Fireman’s to Owhadi (Dkt. No. 80-12) at 2.⁴ Only Herndon held title to the
5 Malibu Property. *See* Owhadi Decl. (Dkt. No. 82) ¶ 6.

6 Prior to the wrongful death lawsuit, plaintiff Hartford Casualty Insurance Company
7 (“Hartford”) issued to Herndon a business liability policy with both primary coverage (\$2,000,000
8 limit) and excess coverage (\$1,000,000 limit). SAC, Ex. C, Hartford policies (Dkt. No. 42-3) at
9 CP127, CP143. The Hartford policies were in effect from March 19, 2009 to March 1, 2010. *Id.*
10 at CP143.

Defendant Fireman's Fund Insurance Company ("Fireman's") issued a primary homeowner's policy (the "Primary Policy"), listing the Malibu Property, with a \$300,000 limit,

² A jury found Herndon solely liable and awarded \$14,000,000 in damages; the award was later reduced to \$8,800,000. Order on Mot. to Dismiss (Dkt. No. 55) at 1.

³ Fireman's filed numerous requests for judicial notice along with its motion for summary judgment. RJN (Dkt. No. 74-14; Dkt. No. 86-4). Fireman's requests that the Court take judicial notice of the trial transcripts of the Underlying Action from April 17, May 28, May 29, April 22, June 12, May 30, and May 16. See Dkt. Nos. 74-15, 74-16, 74-17, 74-18, 74-19, 74-20, 74-21, 72-22, 74-26, 74-27, 74-29, 86-5. Additionally, Fireman's requests that the Court take judicial notice of the jury verdict from the Underlying Action, the filing entitled "Plaintiff's Acceptance of Remittitur" in the Underlying Action, the Second Amended Complaint filed by Hartford, and this Court's Order Denying Fireman's Fund Insurance Company's Motion to Dismiss. See Dkt. Nos. 74-24, 74-25, 74-28. Hartford does not object to the requests for judicial notice.

The facts established in the Underlying Action include that Herndon was a real estate and development company which was held 100% negligent for the death of its employee, Mr. Moreno, and that Herndon bought the Malibu Property not as a vacation home, but as a property to be renovated and flipped. *See RJN, Ex. J*, jury verdict, (Dkt. No. 74-23) at 3:16-22, 5:4-5, 6:9; *RJN, Ex. M*, June 20, 2013 trial transcript (Dkt. No. 74-26) at 6861:25-6862:7.

22 Federal Rule of Evidence 201 permits a court to take judicial notice of adjudicative facts
23 “not subject to reasonable dispute.” Fed. R. Evid. 201. Further, a court may “take notice of
24 proceedings in other courts, both within and without the federal judicial system, if those
25 proceedings have a direct relation to matters at issue.” *U.S. ex rel. Robinson Rancheria Citizens*
26 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (internal citations omitted); *see also*
 United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (holding that a court can take judicial
 notice “of its own records in other cases, as well as the records of an inferior court in other
 cases”).

The Court GRANTS the request.

⁴ The page numbers cited throughout this order refer to the page numbers generated by ECF unless otherwise noted.

1 and named “Paul Owhadi c/o Herndon Partners LLC” as the insured and “Herndon Partners LLC”
2 as an additional insured. Hadfield Decl., Ex. A, Primary Policy (Dkt. No. 74-2) at FF000256,
3 FF000295. The Primary Policy was in effect from October 29, 2008 to October 29, 2009. *See id.*
4 at FF000255. Fireman’s also issued an excess liability policy (the “Excess Policy”) with a
5 \$5,000,000 limit, effective October 2, 2008 to October 2, 2009. *See* Hadfield Decl., Ex. B, excess
6 policy (Dkt. No. 74-3) at FF000146; Kastan Decl., Ex. G, email excerpts between Burns and
7 O’Hadi (Dkt. No. 80-7) at BW000260. The Excess Policy was a personal umbrella policy that
8 named “Paul Owhadi [and] Susan Owhadi” as insureds. *See id.* at BW000252; Hadfield Decl.,
9 Ex. B, excess policy (Dkt. No. 74-3) at FF000146. Both the Primary Policy and Excess Policy
10 contained exclusions for business activity, business property, and workers’ compensation. *See*
11 Hadfield Decl., Ex. A, Primary Policy (Dkt. No. 74-2) at FF000280-82; Hadfield Decl., Ex. B,
12 Excess Policy (Dkt. No. 74-3) at FF000178-180.

13 Hartford provided a defense to Herndon in the wrongful death lawsuit in 2011. SAC, Ex.
14 A, assignment agreement (Dkt. No. 42-1) at 002. Fireman’s also agreed to provide a defense to
15 Herndon, but only under its Primary Policy. *See* Kastan Decl., Ex. N, May 29, 2013 letter from
16 Fireman’s to Owhadi (Dkt. No. 80-12) at 4. Fireman’s refused to provide coverage under its
17 Excess Policy because Herndon was not a named insured. *See id.* Fireman’s also cited the
18 exclusions for business activity, business property, and workers’ compensation in the Excess
19 Policy as reasons not to provide excess coverage. *See id.* at 2. Fireman’s later refused to
20 indemnify Herndon under the Primary Policy. *See* SAC (Dkt. No. 42) ¶ 47.

21 In July 2013, following the judgment, Herndon, Paul Owhadi, and Susan Owhadi executed
22 an assignment agreement with Hartford. SAC, Ex. A, assignment agreement (Dkt. 42-1) at 20.
23 Hartford now acts as Herndon, Paul Owhadi, and Susan Owhadi’s assignee for claims against
24 Fireman’s related to the Underlying Action and the two Fireman’s policies. SAC, Ex. A,
25 assignment agreement (Dkt. 42-1).

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27 **II. The Present Case**

28 On June 11, 2015, Hartford filed the present complaint alleging causes of action against

1 Fireman's for: (1) indemnity; (2) contribution; (3) reformation; and (4) declaratory judgment. *See*
2 SAC (Dkt. No 42).

3 Fireman's now moves for summary judgment. Fireman's MSJ (Dkt. No. 74).⁵ First,
4 Fireman's advances a counterclaim for rescission, arguing that this Court should rescind both its
5 Primary and Excess Policies due to material misrepresentations by Paul Owhadi. *Id.* at 14:2-3
6 (citing California Insurance Code Section 359 which states, "if a representation is false in a
7 material point . . . the injured party is entitled to rescind the contract."). In the alternative,
8 Fireman's argues that this Court should grant summary judgment against Hartford on Hartford's
9 reformation claim because there is no evidence that the parties mutually intended to cover
10 Herndon or its business activities, or that Owhadi made a unilateral mistake when he sought
11 coverage under the two Fireman's policies.

12 13 III. The Insurance Applications

14 The history of the procurement of the Fireman's policies is as follows: Paul Owhadi
15 submitted primary and excess applications to Cross-Defendant Mosen O'Hadi, a licensed
16 insurance broker representing Owhadi's (and Herndon's) interests. *See id.* at 12:1-2; Near Decl.,
17 Ex. P, O'Hadi's homeowner application (Dkt. No. 74-10); Near Decl., Ex. Q, Burns' personal
18 umbrella application (Dkt. No. 74-11). After Owhadi completed the primary and excess
19 applications, O'Hadi contacted Donna Bacarti, a personal lines manager at Defendant Burns &
20 Wilcox ("Burns"), a wholesale insurance broker. O'Hadi submitted to Bacarti a "Homeowner's
21 Application" and a "Personal Umbrella Application" (respectively, the "Primary Application" and
22 the "Excess Application"). Bacarti Decl. (Dkt. No. 74-13) ¶¶ 1-4, 6, 9. The Primary Application
23 identified the named insured as "Herndon Partners LLC" and sought to insure the Malibu
24 Property. Kastan Decl., Ex. C, Primary Application submitted to Burns (Dkt. No. 80-3) at
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28 ⁵ Along with its motion, Fireman's includes evidentiary objections to the declarations of
Joshua Kastan, Paul Owhadi, and Don Way because they were not subscribed as true under
penalty of perjury. Reply (Dkt. No. 86) at 6:12-18. All three of these declarations have since been
supplemented with the required subscription. *See* Errata (Dkt. Nos. 88, 89, 90). As such, the
Court OVERRULES AS MOOT Fireman's evidentiary objection.

1 BW000246. The applicant's occupation was "real estate investor" and the applicant's employer
2 was "Sierra Pacific," a real estate development company. *Id.* at BW000246.⁶

3 Fireman's points out that the applications contain a number of questions to which Owhadi
4 answered "no." See Fireman's MSJ (Dkt. No. 74) at 12:18. These include whether "any farming
5 or other business [is] conducted on premises?," whether "any real estate [is] . . . used
6 commercially or for business purposes?," and whether "any business and/or professional activities
7 [are] included in the primary policies?" Near Decl., Ex. P, O'Hadi's homeowner application (Dkt.
8 No. 74-10) at Ohadi 000314; Near Decl., Ex. Q, Burns' personal umbrella application (Dkt. No.
9 74-11) at BW000011.

10 Bacarti then sent both applications to Lynn Hadfield, a personal lines underwriting
11 specialist at Fireman's. Bacarti Decl. (Dkt. No. 74-13) ¶¶ 6, 9; Hadfield Decl. (Dkt. No. 74-1)
12 ¶¶ 7, 9. Hadfield was responsible for approval and issuance of both policies. Hadfield Decl. (Dkt.
13 No. 74-1) ¶ 4. Bacarti advised Hadfield that, "according to Mr. O'Hadi, the Malibu Property was
14 a vacation home . . . owned by Herndon Partners, LLC." Bacarti Decl. (Dkt. No. 74-13) ¶ 7.
15 Bacarti also advised Hadfield that Herndon was created for tax purposes only, did not conduct
16 business, and consisted solely of Owhadi. Hadfield Decl. (Dkt. No. 74-1) ¶ 5. Hadfield made a
17 number of notes in the underwriting file to document this conversation. Fireman's version of the
18 primary application with these notes reflects that the named insured is "Paul Owhadi c/o Herndon
19 Partners LLC." Kastan Decl., Ex. D, Fireman's version of the primary application (Dkt. No. 80-4)
20 at FF000019. The notes on this application also state that Herndon is "made up of the insd. only
21 for tax purposes." *Id.* Fireman's underwriting file confirms that (1) the "LLC is listed as add'l
22 insd (made up of the insd. only for tax purposes)"; (2) that "only [the] insured makes up LLC and
23 no business exposure — is acceptable"; and (3) that Hadfield "verified that the liab will be listed
24 not extended due to the LLC. The LLC is made up of Paul Owhadi (the insd) only and it is not a
25 formal corporation, just created for tax purposes." Hadfield Decl., Ex. C, underwriting file (Dkt.
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27 _____
28 ⁶ The Excess Application lists "Paul & Susan Owhadi" as the named insureds and does not
list the Malibu Property. "Herndon" is absent from the excess application. Near Decl., Ex. Q,
Burns' personal umbrella application (Dkt. No. 74-11) at BW000008; Kastan Decl., Ex. B, excess
application (Dkt. No. 80-2) at F000076.

1 No. 74-4) at FF000009-12.

2 Fireman's alleges that it discovered that these representations were false based on the
3 Underlying Action, which established that Herndon was a real estate and development company
4 that conducted business, and that the Malibu Property was not a vacation home, but rather a "flip."
5 RJN, Ex. M, June 12, 2013 trial transcript, judgment on verdict by Judge Snauffer, (Dkt. No. 74-
6 26) at 6861:23-6862:2. Hadfield contends that "Fireman's Fund would not have issued the
7 polic[ies] had it known that the Malibu Property was not a vacation property and was in fact a
8 business property owned by a real estate and development business." Hadfield Decl. (Dkt. No.
9 74-1) ¶¶ 8, 10.

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11 **IV. The Arguments of the Parties**

12 Fireman's asserts that it is entitled to rescind the policies based on Owhadi's material
13 misrepresentations that the Malibu property was a vacation home, that Herndon was created
14 merely for tax purposes, and that Herndon was not engaged in business. Fireman's MSJ (Dkt. No.
15 74) at 8:23-26. In the alternative Fireman's argues that because there was no common intention of
16 the parties to enter into a commercial general liability contract, Hartford's reformation count fails.
17 *Id.* at 9:10-11.

18 Hartford argues in opposition that, while Owhadi did not make any misrepresentations in
19 his applications, he did make a unilateral mistake which supports its reformation claim.⁷ See

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21 ⁷ Hartford filed numerous objections to Fireman's' evidence. Dkt. No. 79 at 24-26. The
22 Court OVERRULES Hartford's objections to ¶¶ 4, 5, 7 of the Bacarti Declaration and ¶ 5 of the
23 Hadfield Declaration. The statements demonstrate the state of mind of the individuals issuing the
24 policies; documentary evidence of what individuals heard is not required to establish foundation
25 for the statements. The Court OVERRULES Hartford's objections to ¶¶ 8, 10 of the Hadfield
26 Declaration; foundation is provided through personal knowledge which is not speculative and does
27 not assume facts. Hadfield has sufficient knowledge to render an opinion about her own
28 performance as an underwriting specialist at Fireman's. The Court OVERRULES AS MOOT
Hartford's objections to ¶ 2 at 2:10-11 of the Near Declaration and to ¶ 3, Ex. E of the Near
Declaration. The parties do not dispute that Herndon ultimately held title to the property located
at 31522 Broad Beach Road in Malibu, California at the time of the events that gave rise to the
underlying action. See Owhadi Declaration, Dkt. No. 82 ¶ 6. The Court's analysis is not affected
by statements to the effect that Paul Owhadi "entered into" an agreement to purchase the Malibu
Property or "subsequently placed ownership of the property in Herndon Partners." The Court
OVERRULES Hartford's objection to ¶ 8, citing Ex. R of the Near Declaration. Ex. R is an email
from O'Hadi to Bacarti, with the subject heading, "Paul [O]whadi" stating, among other things,

1 Oppo. (Dkt. No. 79) at 21:13-23.

2 The Court has carefully reviewed the parties' submissions. There is no evidence to support
3 Hartford's reformation claim: there is no evidence that Owhadi made a unilateral mistake, or that
4 Fireman's knew or should have known of Owhadi's mistake, or that the parties actually had a
5 mutual intention to provide coverage for business activities under the Fireman's policies, or that
6 the parties had the mutual intention that Herndon would be either a named or additional insured on
7 Fireman's Excess policy. Because the Court will not reform the Fireman's policies, Hartford's
8 claims for indemnity, contribution, and declaratory judgment based on the reformation of those
9 policies also fail. Because the originally issued Fireman's policies remain in place (with the
10 Primary Policy containing a business activities exclusion and the Excess Policy not naming
11 Herndon as an insured) Hartford is not entitled to recover from Fireman's pursuant to the two
12 Fireman's policies. The Court will therefore dismiss Fireman's crossclaim for rescission as moot.
13

14 **LEGAL STANDARD**

15 Summary judgment is proper "if the movant shows that there is no genuine dispute as to
16 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
17 The moving party bears the initial burden of demonstrating the absence of a genuine issue of
18 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however,
19 has no burden to disprove matters on which the nonmoving party will have the burden of proof at
20 trial. *Id.* at 325. The moving party need only demonstrate to the Court that there is an absence of
21 evidence to support the non-moving party's case. *Id.*

22 Once the moving party has met its burden, the burden shifts to the nonmoving party to "set
23 forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a
24 genuine issue for trial.'" *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630
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26 that Owhadi was "buying a vacation home." This statement is independently corroborated by
27 Bacarti's Declaration, dkt. no. 74-13 ¶ 4, and goes to Bacarti's state of mind when she advised
28 Fireman's of O'Hadi's description of the property and its ownership. *See id.* ¶ 7. The Court
finally OVERRULES AS MOOT Hartford's objection to Fireman's request for judicial notice, Ex.
4 ¶ 3, page 4059. This statement was made by an attorney in closing argument in the Underlying
Action and is thus not evidence.

1 (9th Cir. 1987) (citing *Celotex*, 477 U.S. at 324). To carry this burden, the non-moving party must
2 “do more than simply show that there is some metaphysical doubt as to the material facts.”
3 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The mere
4 existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the
5 jury could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
6 242, 252 (1986).

7 In deciding a summary judgment motion, the Court must view the evidence in the light
8 most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255.
9 However, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise
10 genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*,
11 594 F.2d 730, 738 (9th Cir. 1979).

12 DISCUSSION

13 I. Hartford is Not Entitled to Reformation of Fireman’s Policies

14 California Civil Code § 3399 provides,

15 When, through fraud or a mutual mistake of the parties, or a mistake of one party,
16 which the other at the time knew or suspected, a written contract does not truly
17 express the intention of the parties, it may be revised on the application of a party
18 aggrieved, so as to express that intention, so far as it can be done without prejudice
to rights acquired by third persons, in good faith and for value.

19 Reformation is an equitable remedy intended to correct injustice so as to reflect the true intent of
20 the parties to the original contract. See *Jones v. First Am. Title Ins. Co.*, 107 Cal. App. 4th 381,
21 388-389 (Cal. Ct. App. 2003). The intent of the parties in a cause of action for reformation “refers
22 to a single intention which is entertained by both parties.” *Jolley v. Chase Home Fin., LLC*, 213
23 Cal. App. 4th 872, 908 (Cal. Ct. App. 2013) (internal quotation marks and citation omitted).
24 “Although a court of equity may revise a written instrument to make it conform to the real
25 agreement, it has no power to make a new contract for the parties.” *Id.* (internal quotation marks
26 and citations omitted).

27 Hartford argues that the Fireman’s policies should be reformed because they are illusory as
28 written, do not name the correct insured, and therefore do not reflect the true intentions of the

1 parties. Oppo. (Dkt. No. 79) at 21:10-13. Hartford relies on “Paul Owhadi’s unilateral mistake”
2 to predicate its reformation claim. *Id.* at 21:9-10. Hartford also asserts that Fireman’s “knew or
3 should have known” that Owhadi made a mistake in procuring the policies “because it had
4 knowledge of facts that distinctly showed Herndon intended to purchase and did purchase the
5 Malibu Property” and therefore should have been provided with coverage for business activities,
6 as well as being a named insured. *Id.* at 21-23.

7 Fireman’s responds that Hartford has failed to provide any evidence showing (1) that the
8 parties shared a mutual intention to cover business activities on the property pursuant to the
9 Primary Policy or to name Herndon as an insured on the Excess Policy; or (2) that Owhadi made a
10 mistake in procuring the Primary or Excess Policy; or (3) that Fireman’s knew or suspected
11 Owhadi’s purported mistake(s). Reply (Dkt. 86) at 15-18; Supp. Reply (Dkt. 104) at 5: 10-17.
12 The Court agrees with Fireman’s.

13

14 II. The Fireman’s Fund Primary Policy

15 As executed, the Fireman’s Fund Primary Policy contains a business activities exclusion.
16 Kastan Decl., Ex. I, Primary Policy (Dkt. No. 80-9) at FF000275, FF000280. In order to overcome
17 summary judgment on its reformation claim, Hartford must present some evidence that the parties
18 had a mutual intention that the primary insurance agreement would cover Herndon, a business (in
19 addition to Owhadi and his wife), and that this intention conflicted with the written instrument.
20 Hartford must also present evidence of a mistake on Owhadi’s part, which Fireman’s knew or
21 should have known about when Fireman’s issued the policy.

22

23 A. There Is No Evidence of a Mutual Intention by the Parties to Cover Business Activities Pursuant to the Primary Policy

24 To reform a contract to reflect the true intention of the parties, “[i]t must appear there was
25 a mutual intention of the parties.” *La Mancha Dev. Corp. v. Sheegog*, 78 Cal. App. 3d 9, 16-17
26 (Cal. Ct. App. 1978).

27 Hartford has presented no evidence that Fireman’s had the intention, shared with Owhadi,
28

1 that the Primary Policy—a *personal* lines homeowner’s policy—was intended to cover the
2 business activities of Herndon.

3

4 **B. There Is No Evidence of a Unilateral Mistake by Owhadi in Securing the
Primary Policy**

5 Under California Civil Code Section 3399, a reformation claim can succeed if, through a
6 “mistake of one party, which the other at the time knew or suspected, a written contract does not
7 truly express the intention of the parties[.]” California courts have held that the mistake of one
8 party is a sufficient basis for reformation “only when the mistake is known or suspected by the
9 other party.” *See La Mancha Dev. Corp. v. Sheegog*, 78 Cal. App. 3d 9, 16 (Cal. Ct. App. 1978);
10 *see also City of Cypress v. New Amsterdam Cas. Co.*, 259 Cal. App. 2d 219, 225 (Cal. Ct. App.
11 1968). Further, “constructive notice of the unilateral mistake of the other party is not a sufficient
12 ground for reformation.” *La Mancha*, 78 Cal. App. 3d at 16.

13 There is no evidence that Owhadi made a mistake when he secured the Primary Policy.

14 Hartford argues that Owhadi “believed he had secured [P]rimary and [E]xcess policies
15 from Fireman’s Fund that covered Herndon, himself and his wife for, among other things, liability
16 at the Malibu Property.” Oppo. (Dkt. No. 79) at 21:21-23. Hartford contends that “Owhadi
17 believed he required this breadth of coverage to not only protect Herndon as the owner of the
18 Malibu Property, but also himself and his wife to the extent he was exposed to personal liability
19 through his business and his wife under community property laws.” *Id.* at 21:23-25.

20 Hartford supports these arguments by highlighting that Fireman’s initially agreed to
21 provide Herndon with a defense to the Underlying Action under the Primary Policy. *Id.* at 22:1-3.
22 Fireman’s mistake in providing a defense to Herndon in the Underlying Action is not the unilateral
23 mistake that Hartford needs. Hartford must provide the Court with evidence that *Owhadi* made a
24 unilateral mistake in securing the policy.⁸ In support of Owhadi’s mistake, Hartford cites to one
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27 ⁸ The Court observes that it clearly set out the basis for this cause of action in its prior
28 order denying Fireman’s motion to dismiss Hartford’s SAC. *See Order, Mot. to Dismiss* (Dkt. No.
55) at 4-5.

1 paragraph of the Owhadi declaration, which states,

2 On the eve of the jury verdict in the underlying wrongful death suit, Fireman's
3 Fund declined to acknowledge coverage for Herndon under the Fireman's Fund
Excess Policy.

4 Fireman's Fund had been defending Herndon for several years under the Fireman's
5 Fund Primary Policy without any reservation of rights as to Herndon's indemnity.
6 Fireman's Fund even hired its own attorney to represent Herndon in the underlying
wrongful death action.

7 Oppo. (Dkt. No. 79) at 22:1-4 (citing Owhadi Decl. (Dkt. No. 82) ¶ 19).

8 This portion of the Owhadi declaration fails to assert any mistake on Owhadi's part
9 regarding the acquisition of the Primary policy. This is the only evidence Hartford cites in its
10 opposition. Notably, the Court provided Hartford with the opportunity to supplement its
11 opposition after taking further depositions in this case.⁹ See Order for Supp. Br. (Dkt. 98).
12 Hartford's supplemental opposition asserts that "all the information Fireman's Fund needed to
13 issue . . . its policies was *correctly* and accurately represented on the application forms" filled out
14 by Owhadi. Supp Oppo. (Dkt. No. 100) at 3:14-16 (emphasis added).

15 The Court has searched the record for evidence of a unilateral mistake on Owhadi's part in
16 securing the Primary Policy. Because Hartford has not put forth "sufficient evidence supporting
17 the claimed factual dispute" on whether Owhadi made a mistake, summary judgment is proper.
18 See *Anderson*, 477 U.S. at 249.

19

20 **C. There Is No Evidence That Fireman's Knew or Suspected That Owhadi Made
21 a Mistake in Securing the Primary Policy**

22 The Court also finds no evidence that Fireman's knew or suspected that Owhadi made a
23 mistake when he sought homeowner's insurance pursuant to the Fireman's Primary Policy.

24 Hartford first contends that Fireman's should have inquired as to Herndon's status and/or
25 insurability, noting that "Herndon was a business in the form of a limited liability corporation."

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27 _____

28 ⁹ Hartford requested the opportunity to complete additional depositions prior the close of discovery and was provided this opportunity by the Court. Oppo. (Dkt. No. 79) at 23; Order for Supp. Briefing (Dkt. No. 94); Hartford Supp Br. (Dkt. No. 100).

1 See Oppo. (Dkt. No. 79) at 22:8-9. Entities such as limited liability companies may hold and
2 convey property, however. 4 Cal. Real Est. § 11:66; *see also BedRoc Ltd., LLC v. United States*,
3 541 U.S. 176, 180 (2004) (noting that an LLC “acquired the property”); *see also Kwok v.*
4 *Transnation Title Ins. Co.*, 170 Cal. App. 4th 1562, 1565 (Cal. Ct. App. 2009) (stating that “the
5 LLC purchased real property”). Herndon’s designation as an LLC was insufficient to raise
6 Fireman’s suspicions concerning Owhadi’s alleged mistake in securing a personal lines
7 homeowner’s insurance policy. O’Hadi represented to Fireman’s that the Malibu Property was
8 owned by Herndon, that Herndon consisted solely of Paul Owhadi, and that Herndon did not
9 actually conduct business. Hadfield Decl. (Dkt. No. 74-1) ¶ 5.

10 Second, Hartford asserts that Fireman’s knew or should have known of Owhadi’s mistake
11 because “Herndon held exclusive title to the Malibu Property.” Oppo. (Dkt. No. 79) at 22:10. As
12 noted above, limited liability corporations routinely hold title to real property. *See* 4 Cal. Real est.
13 § 11:66; *see also BedRoc*, 541 U.S. at 180; *see also Kwok*, 170 Cal. App. 4th at 1565. Further, as
14 Fireman’s observes, “no one has ever disputed that Herndon was the owner of the property.”
15 Reply (Dkt. No. 86) at 9:27-28. Although Herndon held title to the Malibu Property, Fireman’s
16 has advanced evidence in support of its belief that Herndon was created for tax purposes only and
17 did not actually conduct business, as well as its subsequent decision to issue the policies to Paul
18 Owhadi and his wife based on Owhadi’s answers to questions in the insurance applications.

19 Third, Hartford claims that Fireman’s should have inquired further because “Mosen
20 O’Hadi intended to obtain a [P]rimary and [E]xcess policy from Fireman’s Fund covering
21 Herndon, Paul Owhadi and Susan Owhadi.” Oppo. (Dkt. No. 79) at 22:11-13. There is no
22 evidentiary support for this claim. Hartford cites to a portion of O’Hadi’s deposition, which
23 states, “to me, Paul, Susan, they’re husband and wife . . . and Herndon . . . Partners is them. So to
24 me, they’re all one . . . the Partners is just — it’s just another name for [Paul and Susan Owhadi],
25 as far as I understood.” Oppo. (Dkt. No. 79) at 22:12-13; Reply (Dkt. No. 86) at 10:1-11. On its
26 face the O’Hadi deposition fails to assert an intention to obtain coverage for Herndon as a business
27 entity distinct from Paul Owhadi and Susan Owhadi. Assuming this citation is incorrect and that
28 O’Hadi did possess such intent, there is no evidence before this Court that this intent was

1 communicated to Fireman's or that Fireman's should have known of such intent. It is unclear how
2 such intent put Fireman's on notice of *Owahdi*'s mistake in securing a personal lines homeowner's
3 policy that was intended to cover the business activities of Herndon.

4 Fourth, Hartford contends that Fireman's possessed information to put it on notice of
5 Owhadi's unilateral mistake because "Herndon and/or Paul Owhadi were identified as a 'real
6 estate investor.'" Oppo. (Dkt. No. 79) at 22:14-15. This assertion is not entirely accurate. On the
7 primary application containing the underwriter's notes, "Paul Owhadi c/o Herndon Partners LLC"
8 is listed as the named insured. Kastan Decl., Ex. D, Fireman's version of the primary application
9 (Dkt. No. 80-4) at FF000019. "Paul Owhadi c/o Herndon Partners LLC" would not have raised
10 suspicions of a mistake by Owhadi merely because Owhadi was employed as a real estate investor
11 with a company called Sierra Pacific. The primary application first submitted by Burns lists the
12 named insured as "Herndon Partners, LLC," however the applicant is still Paul Owhadi. Dkt. No.
13 80-3 at BW000248 (signature of Paul Owhadi). More to the point, it is not clear to the Court how
14 Owhadi's occupation as a real estate investor would have notified Fireman's of Owhadi's mistake
15 in his homeowner's insurance application containing a business activities exclusion. Presumably
16 real estate investors also procure homeowner's insurance.

17 Fifth, Hartford contends that Fireman's possessed information to put it on notice of
18 Owhadi's mistake because "the Malibu Property was a vacation home and not Paul Owhadi's
19 primary residence." Oppo. (Dkt. No. 79) at 22:16-17. Fireman's initially believed that the Malibu
20 Property was a vacation home rather than a business property (or a primary residence), and as such
21 its issuance of homeowner's insurance with a business activities exclusion was proper. *See*
22 Fireman's MSJ (Dkt. No. 74) at 16:28-17:1.

23 Sixth, Hartford states that the "Malibu Property was to 'go through a complete overhaul'
24 immediately after its purchase by Herndon." Oppo. (Dkt. No. 79) at 22:18-19. Owners can
25 renovate vacation homes, as can business entities. This fact is insufficient to have put Fireman's
26 on notice of any potential problems with insurability.

27 Seventh, Hartford claims that Fireman's should have inquired further because "Herndon
28 and/or Paul Owhadi owned, occupied or rented - *at a minimum* - eleven other properties"

1 (emphasis included in original). Oppo. (Dkt. No. 79) at 22:20-21. Hartford supports this assertion
2 by citing to the excess application which lists eleven properties. *See id.* at 22: 22-23; Kastan
3 Decl., Ex. Ex. B, excess application (Dkt. No. 80-2) at FF000084-85. First, Hartford does not
4 explain how this evidence should have put Fireman's on notice when it issued the Primary Policy
5 with the business activities exclusion. In any event, as stated by Owhadi in his declaration, "many
6 of the properties listed on the Fireman's Fund Excess Policy were held by entities, such as the
7 [Malibu Property] that was owned by Herndon or, for example 31502 Victoria Point Road . . .
8 (owned by JMC International, LLC) or 4264 W. Shaw Avenue . . . (owned by Chrisco, LLC).
9 Other properties listed on the Fireman's Fund Excess Policy were owned by me individually, or
10 myself and my wife." Owhadi Decl. (Dkt. No. 82) ¶ 13.

11 Despite these differences, it is clear that Herndon did not "own[], occup[y] or rent[] - at a
12 minimum - eleven other properties." *See Oppo.* (Dkt. No. 79) at 22:20-21. None of the listed
13 properties on the Excess Policy submitted to the Court, other than the Malibu Property, were
14 owned by Herndon.

15 Of the properties that were owned by Owhadi and his wife, the declaration of Don Way, an
16 insurance expert retained by Hartford, claims that "it would be unreasonable for any individual
17 assisting in the application, placing, or issuing of insurance policies to conclude that an individual
18 would own 11 to 18 properties in their own personal name . . . I believe that the standard of care in
19 the insurance industry would be to inquire further." Way Decl. (Dkt. No. 81) ¶ 3. Way's
20 assertion, however, fails to cite any authority which upholds such a standard of care. It is also
21 unclear why an insurer waives its right to rely on the accuracy of statements made in a personal
22 homeowner's insurance application. Even real estate developers are entitled to secure
23 homeowner's insurance for a vacation home or a primary residence.

24 Finally, Hartford contends that Fireman's had notice of facts which should have caused it
25 to inquire further because "the additional properties listed in the excess application were identified
26 as 'rentals' that were rented to others." *See Oppo.* (Dkt. No. 79) at 22:22-23. Again, Hartford
27 fails to explain how this evidence should have put Fireman's on notice when it issued the Primary
28 Policy with a business activities exclusion. If this was intended as evidence of Owhadi's mistake

1 in securing the Excess Policy (see below), the Court agrees with Fireman's that this fact is
2 irrelevant, as Herndon did not own any of these properties. *See Reply* (Dkt. No. 86) at 11:5-6.
3 Hartford further contends that "Herndon's ownership of numerous rental properties, including the
4 Malibu Property, was disclosed to Fireman's Fund." Oppo. (Dkt. No. 79) at 13:25-26. There is
5 simply no evidence in the record that Herndon owned "numerous rental properties." *See id.*;
6 Owhadi Decl. (Dkt. No. 82) ¶ 13.

7 There is no evidence that Fireman's knew or should have known of Owhadi's purported
8 mistake in securing the Primary Policy with a business activities exclusion.
9

10 **III. The Fireman's Fund Excess Policy**

11 As executed, the Fireman's Fund Excess Policy does not list Herndon as a named
12 insured.¹⁰ Kastan Decl., Ex. H, Excess Policy (Dkt. No. 80-8) at FF000146. In order to overcome
13 summary judgment on its reformation claim, Hartford must present some evidence that the parties
14 had a mutual intention that the excess insurance agreement would cover Herndon, a business (in
15 addition to Owhadi and his wife), and that this intention conflicted with the written instrument.
16 Hartford must also present evidence of a mistake on Owhadi's part, which Fireman's knew or
17 should have known about when Fireman's issued the Excess Policy.
18

19 **A. There Is No Evidence of a Mutual Intention by the Parties to Cover Herndon 20 Pursuant to the Excess Policy**

21 Hartford does not advance, nor has the Court located in the record, any evidence that
22 Fireman's intended that the Excess Policy should cover Herndon. Rather, all the evidence
23 establishes that Fireman's intended and ultimately did issue the Excess Policy as a personal
24 catastrophe excess liability policy to Paul Owhadi and Susan Owhadi. Kastan Decl., Ex. H,
25 Excess Policy (Dkt. No. 80-8).
26

27 ¹⁰ The Excess Policy also contains a business activities exclusion, an issue not
28 meaningfully briefed by either party. Kastan Decl., Ex. H, Excess Policy (Dkt. No. 80-8) at
FF000156, FF000173, FF000178.

B. There Is No Evidence of a Unilateral Mistake by Owhadi in Securing the Excess Policy

There is no evidence that Owhadi made a mistake in securing the Excess Policy to cover himself and his wife. In fact, a supplemental declaration provided by Hartford’s expert, Edward J. McKinnon, recounts his review of Fireman’s Fund’s claim activity notes, which includes a statement by Owhadi to Fireman’s claims representative on April 23, 2013 that Owhadi thought the Fireman’s Excess Policy would extend “[to] himself and the house but not Herndon[.]” Supp. Decl. McKinnon (Dkt. No. 102) at ¶ 16; *see also* Supp. Decl. Kastan (Dkt. No. 103-8) (containing the claim activity note). Notwithstanding the lack of personal knowledge and hearsay problems this piece of evidence presents,¹¹ the Court underscores that it is Hartford — the party seeking reformation to reflect that Owhadi made a mistake and intended the Excess Policy to cover Herndon — that is advancing this evidence for the Court’s attention.

C. There Is Also No Evidence That Fireman's Knew or Suspected That Owhadi Made a Mistake in Securing the Excess Policy

Hartford lists the same reasons recounted above for why Firemen's knew or should have known of Paul Owhadi's mistake in securing the Excess Policy. *See* Oppo (Dkt. No. 79) at 22. This evidence is insufficient to overcome summary judgment as to the Excess Policy as well. There is simply no evidence that Fireman's Fund knew or should have known that Owhadi made a mistake when he sought out, and ultimately received personal umbrella coverage pursuant to, the Excess Policy.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS Fireman's motion for summary judgment on Hartford's claim for reformation. Because the

¹¹ The Court observes that the alleged claim activity note appears to have been made by Melanie Juarros, a claims representative for Fireman's. Supp. Decl. Kastan (Dkt. No. 103-8). Ms. Juarros was not called to authenticate this document. Hartford informed the Court in its supplemental brief that "the parties are in the process of coordinating" Juarros's deposition. Supp. Br. (Dkt. No. 100) at 4:20-21. Nothing in the record reflects that this deposition was taken.

1 policies will not be reformed by this Court, the remaining allegations in Hartford's Second
2 Amended Complaint against Fireman's for indemnity, contribution, and declaratory judgment
3 based on the reformation of those policies are therefore DISMISSED WITH PREJUDICE as
4 moot.¹² Fireman's counterclaim for rescission will be DISMISSED as moot in light of the fact
5 that Fireman's has declined coverage and the policies remain as originally executed: both with a
6 business exclusion, with the Excess not naming Herndon as an insured. *See* SAC (Dkt. 42) ¶ 47;
7 Decl. Kastan Exh. N (Dkt. No. 80-12).

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IT IS SO ORDERED.

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Dated: August 22, 2016

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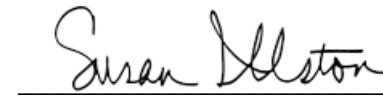
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SUSAN ILLSTON
United States District Judge

¹² On June 6, 2016 and July 7, 2016, Hartford and Fireman's filed a series of joint statements regarding discovery disputes that persist between them. Dkts. No. 91, 107, 108, 109, 110, 111, 113. Because the Court has granted Fireman's motion for summary judgment and dismissed Hartford's remaining allegations against Fireman's as moot, these discovery disputes are MOOT as well.